[2019] UKFTT 0119 (TC)

TC06985

Appeal number: TC/2017/07845

VAT – DIY house-builders scheme – electric blinds – building material or electric appliance – eco-build homes – ordinarily incorporated – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr David Cosham **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE Rachel Short
Mr Mark Buffery (Member)

Sitting in public at The Law Courts, Petters Way Yeovil on 21 August 2018

Mr David Cosham the Appellant in person

Mr Leslie Bingham, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against HMRC's decision of 16 October 2017 that no refund is payable under the DIY house-builders scheme set out at s 35 Value Added Tax Act 1994 for £2303.17 of VAT (input tax) incurred by the Appellant in relation to the supply of electric blinds fitted at his "eco-build" property.

2. Mr Cosham's VAT representative wrote to HMRC on 6 March 2017 claiming a total of £14,505.53 in VAT refunds under the DIY housebuilders scheme. HMRC accepted some elements of this claim but rejected the element of Mr Cosham's claim which related to VAT on the electric blinds installed at his property, amounting to £2303.17

3. Mr Cosham asked for a review of this decision on 24 August 2017, which was provided by HMRC on 16 October 2017 confirming their original view that the VAT incurred on the electric blinds installed at Mr Cosham's property could not be re-claimed under the DIY house-builders scheme because the electric blinds did not fall within the definition of "building materials" at Note 22 of Group 5 Schedule 8 Value Added Tax Act 1994 ("VATA 1994").

4. Mr Cosham appealed to this tribunal on 26 October 2017.

Background facts

5. The items to which this appeal relates are electric blinds installed at Mr Cosham's property which he describes as an "eco-build" property or a sustainable home.

6. The electric blinds were installed in the rooms in the property which were south facing, being the shared rooms in the house and were programmed to regulate the temperature in those rooms.

The law

7. Mr Cosham's claim for a VAT refund was made under s 35 VATA 1994

> "Refund of VAT to persons constructing certain buildings:
>
> 35(1) where
>
> (a) a person carries out works to which this section applies,
>
> (b) his carrying out of the works is lawful and otherwise than in the course or furtherance of any business, and
>
> (c) VAT is chargeable on the supply, acquisition or importation of any goods used by him for the purpose of the works,
>
> the Commissioners shall, on a claim made in that behalf, refund to that person the amount of VAT so chargeable"

8. There are specific conditions which need to be fulfilled in order for a claim under s 35 to be made, including at s 35(1B):

> "For the purposes of this section goods shall be treated as used for the purposes of works to which this section applies by the person carrying out the works in so far only as they are building materials which, in the course of the works, are incorporated into the building in question or its site".

9. S 35(4) provides that the notes to Group 5 of Schedule 8 of the Act apply for the purpose of construing section 35, including Note 22 which provides a definition of "building materials"

> "**Building materials**" in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include-
>
> (a)
>
> (b)
>
> (c) electrical or gas appliances, unless the appliance is an appliance which is –
>
> (i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification, or dust extraction; or
>
> (ii).....

10. Mr Cosham's argument is that the electric blinds installed at his property fall within the definition of building materials at Note 22.

11. We were also referred to a number of case authorities in particular the two *Taylor Wimpey* decisions of the Upper Tribunal *Taylor Wimpey v Commissioners of HMRC* [2017] UKUT 0034(TCC) and [2018] UKUT 055 (TCC).

12. We were also referred to:

(1) Customs & Excise Commissioners v Smitmit Design Centre Limited [1982] STC 525

(2) Michael McCarthy & Georgina McCarthy T/A Croft Homes LON/99/1253

(3) Tom Perry v Commissioners for HMRC LON/05/0369

(4) John Price v Commissioners for HMRC [2010] UKFTT 634(TC)

(5) Coopers Fire Limited v Commissioners for HMRC [2013] UKFTT 154(TC)

Agreed matters

13. HMRC made clear before us that they had accepted that the electric blinds were incorporated within Mr Cosham's property for the purposes of the test at s 35(1B) VATA 1994.

Evidence seen

14. DIY VAT reclaim on behalf of Mr Cosham dated 6 March 2017.

15. Determination of Planning Permission from South Somerset District Council addressed to Mr Cosham in respect of erection of a dwelling house on land south of Folly Lane, South Cadbury dated 14 December 2012.

16. Building Act Certificate of Completion for erection of dwelling house at land south of Folly Lane, South Cadbury dated 9 January 2017.

17. Correspondence between the parties including HMRC's letter of 9 August 2017 setting out amounts repayable under the DIY VAT refund claim and HMRC's letter of 16 October 2017 setting out the basis for rejecting Mr Cosham's claim for a VAT repayment for the electric blinds installed at his property.

Appellant's arguments

18. Mr Cosham's appeal against HMRC's decision of 16 October 2017 is based on his contention that electric blinds of this type are building materials and are "*ordinarily incorporated*" into "*buildings of that description*". In his view "buildings of that description" should be taken to refer to eco-buildings such as his property.

19. He also argues that because the function of the electric blinds is to control the temperature of the rooms in his property, they are not excluded from being treated as building materials under Note 22 as "electrical appliances".

20. Mr Cosham also raises some issues with the manner in which his appeal has been handled by HMRC including their delays in responding to him and HMRC's failure to communicate with him, which he described as verging on professional incompetence which should not be tolerated.

"Buildings of that description"

21. The main point of contention between the parties is how this term used in Note 22 should be interpreted. Mr Cosham says that in identifying "buildings of that description" the correct comparator should be the specific type of building of which his property was one, being an eco-build or sustainable home.

22. He said that these were now a common and well recognised type of building and to compare these with other four bed roomed houses would not be comparing like with like. The test in *Taylor Wimpey* should not be applied to the lowest common

denominator, "generic type" of building referred to erroneously in HMRC's Guidance Note 708; the statutory test refers to "buildings of that description" not to buildings of a generic type. His property was described for planning purposes as a "sustainable home" and that reflects what is now a well-established market sector which should be recognised as a specific type of building for these purposes.

"Ordinarily incorporated"

23. Mr Cosham referred to his knowledge that it was now standard practice in eco-buildings to incorporate electric blinds as a means of temperature control.

24. At the hearing on 21 August Mr Cosham referred to evidence from trade journals which he said established this as standard practice. Mr Cosham did not produce any of the evidence from the trade journals to which he referred. The Tribunal therefore issued Directions requesting that he provide copies of any additional evidence on which he wanted to rely within 90 days.

25. Mr Cosham did not produce any further evidence within the stipulated time or indeed by the date of this decision, some months later.

26. Mr Cosham relied on the First-tier Tribunal decisions in *John Price* in which the Tribunal accepted that roller blinds could be treated as building materials:

> "I conclude..... that roller blinds are as much "goods of a description ordinarily incorporated by builders in a dwelling house" as finished or pre-fabricated furniture..... there seems to me to be nothing "extraordinary" about their incorporation into a dwelling house by builders" [31]

and suggested that, as set out in HMRC's VAT Notice 708 the type of items which should be treated as ordinarily incorporated into buildings was likely to change over time so that some of the older tribunal decisions relied on by HMRC were outdated. This point was accepted by the Tribunal in *Tom Perry*, an appeal concerning electric blinds, which the Appellant lost but in which the Tribunal said:

> "it may be in the fullness of time that his blinds will be accepted as a normal installation.....but that time has not been reached yet" [49]

Electrical appliances

27. Mr Cosham pointed out that the electric blinds installed in his property were used for temperature control purposes and so fell outside the exclusion at Note 22 for electrical appliances. He referred to the First-tier Tribunal decision in *John Price* which found that electrical blinds were excluded from the category of electrical appliances for the purpose of Note 22 and pointed out that HMRC's guidance in VAT

Notice 708 accepted that blinds could be treated as building materials if they were installed by charitable bodies.

HMRC's arguments

"Buildings of that description"

28. Mr Bingham explained that in HMRC's view the correct comparator building for the purposes of applying the test in Note 22 to Mr Cosham's property was an ordinary four bed roomed house. Relying on the comments of the Upper Tribunal in the 2017 *Taylor Wimpey* decision, the correct basis for the comparison is to consider the way the building is used as a building:

> "the legislation is focused on the way a building would be described as a building, and not on the relative quality of the end product. There is for this purpose no proper distinction between luxury homes and other less luxurious dwellings" [136] and
>
> "In our view the proper comparator in the case of any buildings is buildings which most closely accord with the use of the building in question. Thus, a building designed for a single family unit will be compared, for the purpose of determining the ordinariness of the installation as fixtures (or, from 1 March 1995, fittings) with single dwelling houses ..... Sheltered homes, as in *McCarthy & Stone*, are to be compared with other such buildings" [138]

29. A test which is reiterated in the 2018 *Taylor Wimpey* decision:

> "we held that at all times the proper comparator was with buildings that most closely accorded with the use of the building in question (such as a single dwelling house on the one hand, and a building in multiple occupation on the other)" [31]

30. Taking a four bedroom home as the correct comparator in this case, it could not be said that electric blinds were an ordinary feature of such buildings and therefore Mr Cosham's expenditure on the electric blinds in his property did not fulfil the conditions at s 35 construed by reference to Note 22.

Electrical appliances

31. Even if it could be argued that the electric blinds were ordinarily incorporated into buildings of that type, Mr Bingham's second argument was that they were properly to be classified as "electrical appliances". Mr Bingham relied on the Firs- tier Tribunal decisions in *Coopers Fire*, which asked whether an appliance could be used for its essential function without electricity, *McCarthy & Stone*, which considered

electrical gates and *Tom Perry* which held that blinds were electrical appliances, for this conclusion.

32. Mr Bingham pointed out that HMRC had always considered the decision in *John Price* to be incorrect and had published their view in a business briefing at the time.

33. In Mr Bingham's view window blinds could not be treated as for heating and ventilation, as made clear in the *Tom Perry* decision and as set out in HMRC's VAT Manual at p 144.

Discussion and Decision

Findings of fact

34. On the basis of the evidence provided the Tribunal finds as a fact that

(1) Mr Cosham's property at Folly Lane, South Cadbury was an eco-build property.

(2) The electric blinds installed at Mr Cosham's property were intended to regulate the temperature of the building.

Buildings of that description

35. The main point at issue between the parties is the question of how, when considering the installation of fixtures into a specific type of building, that building is to be categorised for the purpose of making the comparison required by Note 22.

36. We are taking the Upper Tribunal decision in *Taylor Wimpey* as the leading guidance on this point, with its suggestion that the test has to be applied not by looking at the quality of the building, but at the use of the building:

> "In our view the proper comparator in the case of any buildings is buildings which most closely accord with the use of the building in question". [138]

37. While that goes some way to determining how the comparator is applied, and certainly rejected the approach in *Rainbow Pools London Ltd v Revenue & Customs Commissioners* (case 20800) which looked at the quality of the finish, it fails to answer at any detailed level how types of "use" are to be divided up.

38. HMRC have assumed that types of "use" means size of house or numbers of occupants, so that all four bedroom houses fall within the same category. However, by

including "sheltered homes" in their suggested categories of "use" types, the Upper Tribunal in *Taylor Wimpey* must be taken to have accepted that a building can be categorised by reference not just to its size but also by other defining features, such as the occupants for which it is designed.

39. We take from this that HMRC's insistence on size of house as the only relevant comparator is too general a comparator and that it should be possible to use a comparator which defines a type of house more specifically than this.

40. We agree with Mr Cosham that now, and more importantly, at the time when he claimed the VAT incurred on the electric blinds in December 2014, sustainable homes or eco-builds would be generally recognised as a distinct category of buildings. The question for us is whether that categorisation is one which goes to the quality of the building (rejected as a category in *Taylor Wimpey*) or the use of the building (accepted as a category in *Taylor Wimpey*).

41. In our view it falls between these two categories, eco-build houses can be built to accommodate different household sizes, but it cannot be said that a four bedroom eco-build house is different than a four bed roomed non-eco-build house merely because of the quality of its finish. It is built with specific components in order to achieve a specific purpose and is more analogous to the sheltered housing referred to in the *Taylor Wimpey* decision.

42. Our conclusion on this point is that eco-build homes can be treated as a distinct type of building for this purpose.

Ordinarily incorporated

43. However, in order to win this appeal Mr Cosham also needs to demonstrate that electric blinds of the type under consideration here are ordinarily incorporated into buildings of this type. Mr Cosham asserted at the Tribunal that this was the case, but despite being given additional time to demonstrate this by means of evidence, did not produce any evidence to the Tribunal to support this contention.

44. On the basis of the evidence provided to the Tribunal, the Tribunal cannot accept that electric blinds are ordinarily installed in eco-build houses and Mr Cosham's appeal on this point must fail.

Electrical appliances

45. Having concluded that these electric blinds cannot be treated as ordinarily incorporated into eco-build homes like Mr Cosham's, the question of whether they should properly be treated as electrical appliances under Note 22 does not arise.

HMRC's handling of Mr Cosham's case

46. The Tribunal understands Mr Cosham's frustration with HMRC's communication failures. However, any complaints of this type should be dealt with in

the first instance through HMRC's own complaints service and are not within the scope of the Tribunal's jurisdiction.

Conclusion

47. For these reasons this appeal is not allowed and HMRC's decision of 16 October 2017 is confirmed.

48. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2019